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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES TRUST COMPANY OF NEW YORK,
J. GREGORY VAN SCHAACK and BRUCE P. DENNEN,

Cross-Petitioners,

— against —

AUGUSTIN J. SAN FILIPPO, ESQ., and
THE HONORABLE ROBERT M. MORGENTHAU,
District Attorney for the County of New York,

Cross-Respondents.

CONDITIONAL CROSS PETITION UNDER RULE 19.5 FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

New York, New York
13 December 1984

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QUESTIONS PRESENTED

1. In this 42 U.S.C. §1983 action for malicious prosecution, did the courts below err in rejecting absolute immunity for private witnesses for off the stand contacts with the District Attorney, alleged to be part of a "conspiracy", contrary to *Vogel v. Gruaz*, 110 U.S. 311, 314 (1884), and the Restatement (Second) of Torts, §587?[1]

2. Is the interest in freedom from unjustifiable litigation, protected by the common law tort of malicious prosecution, a "right, privilege or immunity secured by the Constitution and Laws" in light of *Paul v. Davis*, 424 U.S. 693 (1976), and *Baker v. McCollan*, 443 U.S. 137 (1979)?

3. Assuming plaintiff's claim implicates a liberty interest protected by the due process clause, should it nonetheless have been dismissed under *Parratt v. Taylor*, 451 U.S. 527 (1981) and *Hudson v. Palmer*, 104 S. Ct. 3194, (1984), because the acts complained of were tortious under state law and plaintiff's §1983 action substantially duplicates his common law action for malicious prosecution.?

4. Did the courts below err in not dismissing this claim as untimely under New York's one year statute for malicious prosecution, instead applying a three-year period for statutory liabilities in conflict with state law?[2]

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[1] A closely related issue is before the Court in *McDonald v. Smith*, #84-476, *cert. granted*, 26 Nov. 1984, 53 U.S.L.W. 3403.

[2] A very similar issue is before this Court in *Wilson v. Garcia*, #83-2146, *cert. granted*, 1 October 1984, 53 U.S.L.W. 3235.

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UNITED STATES TRUST COMPANY OF NEW YORK, J. GREGORY VAN SCHAACK and BRUCE P. DENNEN,

Cross-Petitioners

-against-

AUGUSTIN J. SAN FILIPPO, ESQ., and THE HONORABLE ROBERT M. MORGENTHAU, District Attorney for the County of New York,

Cross-Respondents

CONDITIONAL CROSS PETITION UNDER RULE 19.5 FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Conditional cross petitioners, UNITED STATES TRUST COMPANY OF NEW YORK, J. GREGORY VAN SCHAACK and BRUCE P. DENNEN, respectfully pray that a writ of certiorari issue under this Court's Rule 19.5 to review the judgment of the United States Court of Appeals for the Second Circuit, entered on 14 June 1984, in the event that the petition is granted in whole or in part.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported officially at 737 F. 2d 246 (1984) and is reprinted in San Filippo's petition at 1a-23a.

The unreported memorandum order of the United States District Court for the Southern District of New York (Gagliardi, J.) is reprinted in the petition at 26a-35a.

An additional opinion by Magistrate Joel. J. Tyler pertinent to cross petitioners' witness immunity defense is reprinted herein numbered (consecutively from the petition) 36a et seq.

Jurisdiction

The order denying cross-petitioners' motion for summary dismissal on grounds, inter alia, of absolute witness immunity, was entered in the United States District Court for the Southern District of New York on 5 July 1983.

On cross petitioners' appeal filed 12 July 1983, the Second Circuit on 14 June 1984 entered a judgment and opinion reversing the 5 July 1983 order and directing that the complaint be dismissed for failure to state a valid claim for relief. See page 24a of San Filippo's petition for certiorari (hereinafter "petition"). No petition for rehearing was sought.

On 4 September 1984, Justice Marshall ordered that San Filippo's time to petition for writ of certiorari be extended to 10 November 1984.

On 13 November 1984 cross petitioners' counsel received San Filippo's petition dated 9 November 1984 and filed in this Court that day. Cross petitioners rely on this Court's Rule 19.5 and seek review only if the petition is granted in whole or in part.

The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under 28 U.S.C. §1254(1).

Statutes Involved

42 U.S.C. §1983 provides in pertinent part:

> **§1983. Civil action for deprivation of rights.**
> Every person who, under color of any statute, ordi-

nance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress***

(As amended Dec. 29, 1979, P.L. 96-170, §1,93 Stat. 1284).

42 U.S.C. §1988 provides in pertinent part:

§1988. Proceedings in vindication of civil rights.

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.***

(As amended Oct. 21, 1980, P.L. 960481, Title II, §205(c), 94 Stat. 2330.)

Statement of the Case

The pertinent facts are set forth in the opinion of the Second Circuit, reported in San Filippo's petition at 1a-13a, and in cross petitioners' Brief in Opposition to Certiorari. Cross petitioners add the facts pertinent to the cross petition.

The decisive factor that controlled the entire course of this litigation occurred before it was filed: San Filippo allowed New York's limitation period for common law malicious prosecution to run, and thus needed to take advantage of the Second Circuit's rule that all §1983 claims would be governed by a three year period because the one year period provided by New York law is deemed "too short". *Pauk v. Board of Trustees*, 654 F. 2d 856, 862 (2d Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982). Thus the "conspiracy" pleading, a necessary ingredient to show state action under §1983, is in reality nothing but a subterfuge to revive an otherwise stale claim. Cross petitioners also challenged the district court's equation that malicious prosecution plus state action equals §1983 violation (30a-31a). They argued below both that like its common law cousins, defamation and false imprisonment, malicious prosecution is not *per se* actionable, and also that because the common law remedy is adequate, the complaint presents no due process claim.

Early in this litigation, cross petitioners moved to amend their answer to assert defenses, *inter alia*, (i) that absolute witness immunity prohibited the suit based upon their testimony and (ii) that any pretrial discussions with the prosecutor were similarly privileged, citing as the Magistrate noted, "only" *Vogel v. Gruaz*, 110 U.S. 311, 314 (1884), for the latter proposition 44a. Leave to amend on this basis was denied by the Magistrate as "meritless"[3] 45a and defendants' appeal to Judge Gagliardi was denied without opinion.

Defendants also sought discovery of the grand jury transcript for the proceedings involving San Filippo and his confederates, the Morans, and on this issue the District Attorney is joined as a party. The Second Circuit did not reach this issue in view of its dismissal of the complaint.

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[3] As cross petitioners demonstrated, the courts below misconstrued *Roviaro v. United States*, 353 U.S. 53 (1957), as overruling *Vogel v. Gruaz*, 110 U.S. 311 (1884) 45a. *Roviaro*, however, merely held that in some circumstances the government would be obliged to divulge the identify of a "John Doe" informant. Nothing in *Roviaro* purported to determine the potential liability of the John Doe informant in a civil suit for damages, on which *Vogel v. Gruaz* remained controlling law.

REASONS FOR GRANTING THE WRIT

I

THE SECOND CIRCUIT'S RULING DENYING ABSOLUTE WITNESS IMMUNITY CONFLICTS WITH *VOGEL V. GRUAZ*, 110 U.S. 311, 314 (1884), AND IS CONTRARY TO WHAT PROSSER CALLS "THE BETTER VIEW" OF THE COMMON LAW WITNESS IMMUNITY

The circuits are already divided over the application of the witness immunity recognized in *Briscoe v. La Hue*, 460 U.S. 325 (1983) ("*Briscoe*"). The Second Circuit in this case and the Seventh Circuit in *Kincaid v. Eberle*, 712 F. 2d 1023, 1024 (7th Cir.) cert. den. 104 S.Ct. 551 (1983), have extended *Briscoe* to grand jury testimony, while this view was recently rejected in *Wheeler v. Cosden Oil & Chemical Co.*, 734 F. 2d 254, 261 & n.16 (5th Cir. 1984). This case presents not only the question whether witness immunity extends to grand jury proceedings, but also the question of whether respondents contacts outside the grand jury room with the DA's staff are similar protected by what respondents argued below was the "informers' privilege" or "constitutional right to inform", citing *Vogel v. Gruaz*, 110 U.S. 311, 314 (1884) (holding conversation with prosecutor absolutely privileged), and *Re Quarles*, 158 U.S. 532, 535-36 (1895) (government communications absolutely privileged); a protection for a citizen's right to communicate with the government. This "informers" privilege" obviously has much in common with the rights guaranteed by the Petition Clause, which is before this Court in *Mac Donald v. Smith*, #84-476.

Bedeviled by a "conspiracy" allegation it nonetheless found insubstantial, the Second Circuit's ruling rejecting absolute immunity necessarily restricts private witness immunity in §1983 proceedings to actual testimony before the grand jury or at trial. Closely examined, this creates a potential §1983 suit against every private witnesses called by the People in every state criminal trial, and because of the substantial §1983 parallels to a *Bivens* suit, presumably also every witness called by the United States could be forced through expensive and worrisome litiga-

tion such as this very case simply by a lawyer's typing the word "conspiracy" into an otherwise immunity-barred complaint. The Second Circuit's admonition that the district courts "examine with great care" such a suit and dismiss those, like this, which are "clearly baseless", 22a, presents a standard of proof ordinarily impossible for a defendant to meet under Rule 56(b), let alone 12(b) (6). Indeed this very case demonstrates the total futility of such an approach: The district court failed to dismiss such a "clearly baseless" claim, and, because the law is now settled in the Second Circuit that no immunity lies, no further defendants will ever gain interlocutory review of such refusal. The Second Circuit's immunity analysis has three critical defects which rob *Briscoe* of any practical meaning for any private witness:

First: Every §1983 plaintiff suing the adverse witnesses will necessarily allege a "conspiracy" with some state official, generally the responsible prosecutor, because without such an allegation the requisite state action would be lacking. Private witness immunity vitiated by a "conspiracy" allegation is no §1983 immunity at all.

Second: The attempt to abridge absolute witness immunity by alleging an antecedent conspiracy to give false testimony fails under *Yaselli v. Goff*, 12 F.2d 396, 406-07 (2d Cir. 1926), *aff'd.* 275 U.S. 503 (1927). There the plaintiff alleged that he was maliciously prosecuted by a Special Assistant U.S. Attorney. Even though the defendant might be immune for his acts as prosecutor, plaintiff argued, the defendant entered an antecedent conspiracy before his appointment to maliciously prosecute the plaintiff in which the appointment was part of the conspiracy, hence the defendant was not immune for acts undertaken before his appointment. To this the Second Circuit replied:

> The important fact is that he was appointed to the office, and, having been appointed the public interests require that he shall be free and fearless to act in the discharge of his official duties. If he cannot be charged with acting willfully and maliciously after he

> gets appointed to the office no more can he be charged with having conspired to get into the office in order to act willfully and maliciously after he gets his appointment. The one charge is as much to be feared as the other, and is equally derogatory to his public character and usefulness in the office. We are unable to distinguish between the two cases in principle.

Yaselli v. Goff, 12 F.2d at 407.

Obviously an allegation of 'conspiracy' to give false testimony is "as much to be feared" as a suit based on that testimony. Every witness could be intimidated by the prospect of defending a civil suit charging 'conspiracy' to give false testimony just as easily as a suit charging false testimony. The two cases cannot be distinguished in principle.

Third: The fact pattern here is characteristic of virtually any and every private witness suit. In the normal course of a criminal investigation, every witness for the People must be contacted by the DA's office, interviewed by the appropriate assistant district attorney and then presented to a grand or petite jury. The Second Circuit's holding that these off the stand contacts are not absolutely immune from civil suit in practical effect destroys immunity for every witness—unless he were alert enough in the investigating phase to refuse to speak to the prosecutor or produce documents except in front of the grand jury—clearly a rule which would cripple the efficiency of any investigation by the People into a crime and would certainly deter responsible cooperation by private parties. The Fifth Circuit recognized that the District Attorney is absolutely immune for such witness interviews because they are integral parts of presenting the People's case. *Cook v. Houston Post*, 616 F. 2d 791, 793 (5th Cir. 1980). This ruling should govern the scope of witness immunity as well. Because of the policy importance of the immunity for private witnesses in criminal proceedings and because the Second Circuit's holding conflicts with a one decision (*Vogel*) and one affirmance (*Yaselli*) by this Court, it deserves review here.

POINT II

WHETHER THE COURT BELOW ERRED IN HOLDING THAT THE ELEMENTS OF MALICIOUS PROSECUTION ARE ACTIONABLE UNDER §1983 PRESENTS AN IMPORTANT QUESTION IN LIGHT OF *PAUL V. DAVIS*, 424 U.S. 693 (1976) AND *BAKER V. MCCOLLAN*, 443 U.S. 137 (1979), ON WHICH THE COURTS OF APPEALS ARE DIVIDED

The circuits are divided over whether malicious prosecution if accomplished "under color of law" creates a §1983 claim: *San Filippo v. U.S. Trust*, 737 F. 2d 246, 257 n.6 (2d Cir. 1984), *Wheeler v. Cosden Oil & Chemical Co.*, 734 F.2d 254, 257-60 (5th Cir. 1984), *Dunn v. Tennessee*, 697 F.2d 121 (6th Cir. 1982), *Singleton v. City of New York*, 632 F. 2d 185, 194-95 (2d Cir. 1980), *cert. denied*, 450 U.S. 920 (1981), *Jennings v. Shuman*, 567 F. 2d 1213, 1220-21 (3d cir. 1977), *Morrison v. Jones*, 551 F. 2d 939, 940-41 (4th Cir. 1977), all hold that where the elements of the common law tort are satisfied a §1983 claim arises if the "color of law" element be satisfied. *Contra, Bretz v. Zelman*, 722 F. 2d 503, 505 (9th Cir. 1984), *Cloutier v. Town of Epping*, 714 F. 2d 1184, 1190 (1st Cir. 1983), *Cook v. Houston Post*, 691 F. 2d 791, 794-95 (5th Cir. 1980), *Cramer v. Crutchfield*, 648 F. 2d 943, 945 (4th Cir. 1981), *Cline v. Brusett*, 661 F. 2d 108, 112 (9th Cir. 1981), *Martin v. King*, 417 F. 2d 458, 462 (10th Cir. 1969); which hold that malicious prosecution is not per se actionable even if "color of law" be sufficiently pleaded. In view of the large number of §1983 malicious prosecution suits, *see Smith v. Gonzales*, 51 U.S.L.W. 3361 (1982) (White, J., dissenting from denial of certiorari), and this Court's rulings that the closely related torts of false imprisonment and defamation are not *per se* actionable under §1983, this circuit conflict should be resolved, and the Court should consider summary reversal.

"The first inquiry in any §1983 suit . . . . is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.' " *Baker v. McCollan*, 443 U.S. 137, 140 (1979).

The issue here is whether "[t]he interest in freedom from unjustifiable litigation", Prosser, Law of Torts, §119 at 834 (4th Ed. 1971), is one of the "rights, privileges or immunities secured by the Constitution and Laws" within the meaning of §1983. The Constitution does not in terms extends to an individual the right to be free of unjustifiable litigation, or indeed, guarantee freedom from charges except those supported by probable cause. *See Gerstein v. Pugh*, 420 U.S. 103, 119, 125 n.26 (1975) (probably cause determination is a requirement of an arrest, but not a prosecution).[4] Similarly, since the interest protected by malicious prosecution "has much in common with that of reputation," Prosser, *supra*, §119 at 834, if common law defamation under color of law not be actionable under §1983, *Paul v. Davis*, 424 U.S. 693 (1976), then the common law tort of malicious prosecution should not *per se* be actionable either. San Filippo:

> alleges that defendants VAN SCHAACK and DENNEN improvidently granted unsecured loans to MR. and MRS. MORAN, mismanaged the negotiations regarding the "Guaranty and Indorsement," and attempted to blame plaintiff for fraudulently securing the loans for his clients, the Morans, thereby reducing their responsibility for the defaulted loan to the Morans.

Plaintiff's answers to Interrogatories, Set I, sworn to 17 September 1981, number 15.

If such a private grudge by private defendants against a private plaintiff can state a cause of action under the Constitution, §1983 would have become the font of "general federal tort law" which *Paul v. Davis*, 424 U.S. at 701, *supra*, sought to avoid.

By arguing that the interest in freedom from unjustifiable litigation is not *per se* of constitutional magnitude, cross peti-

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[4] The Constitution *does* by its terms protect against "unreasonable . . . seizures," but San Filippo cannot bring any §1983 action arising out of his arrest and alleged 22 hour incarceration, because the record is clear that he was arrested upon warrant *after* indictment, and arrest under valid process, even if erroneous, is not a Constitutional violation. *Baker v. McCollan*, *supra*, 443 U.S. at 145.

tioners do not mean to be understood as arguing that malicious prosecution is never actionable under §1983. For example, if plaintiff were maliciously prosecuted for exercising First Amendment rights, he would have a §1983 claim. *E.g.*, *Dellums v. Powell*, 566 F. 2d 167, 194-96, (D.C. 1977), *cert. den.*, 438 U.S. 916, (1978). Similarly, a plaintiff maliciously prosecuted because of his race or because of his interracial associations would have a §1983 claim, *e.g.*, *Nesmith v. Alford*, 318 F. 2d 110 (5th Cir. 1963) *cert. den., sub nom. Sullivan v. Nesmith*, 375 U.S. 975 (1964).

San Filippo, who belongs to no suspect class, and was not prosecuted for engaging in any constitutionally protected activity, nor to prevent his exercise of any constitutionally protected right, has no cause of action under §1983.

III

BECAUSE PLAINTIFF ALLEGES TORTIOUS ACTS UNDER NEW YORK LAW FOR WHICH AN ACTION FOR MALICIOUS PROSECUTION WOULD GRANT HIM THE SAME RELIEF, HE HAS NO §1983 DUE PROCESS CLAIM IN LIGHT OF *PARRATT V. TAYLOR*, 451 U.S. 527 (1981) (1984) AND *HUDSON V. PALMER*, 104 S.CT. 3194,

But even if we assume that freedom from unjustified criminal litigation is part of either the "liberty" or "property" protected by the due process clause of the Fourteenth Amendment, it does not follow that San Filippo was deprived of either without due process, because his §1983 claim is merely a replica of his otherwise time-barred malicious prosecution claim.

Parratt v. Taylor, 451 U.S. 527 (1981) ("Parratt"), and *Ingraham v. Wright*, 430 U.S. 651 (1977), suggest that claims which rely on the due process clause simpliciter as their foundation for the "right, privilege or immunity secured by the constitution and laws" under §1983 fail to state a claim where the conduct complained of is tortious under state law because "the existence

of a state remedy may provide due process." *Coleman v. Faulkner*, 697 F.2d 1347, 1349 (10th Cir. 1982). The facts here fit well within the due process analysis of *Parratt*, because "the impracticality of providing any meaningful pre-deprivation process can, when coupled with the availability of some meaningful means by which to assess the propriety of the state's action at some time after the initial taking, satisfy the requirements of procedural due process." *Parratt*, 451 U.S. 527, 539 (footnote omitted). No matter how generously read, San Filippo's complaint does not allege that it was the systematic or State approved policy of New York District Attorney Robert Morgenthau's office to enter into malicious conspiracies generally or knowingly present perjured testimony, which are tortious acts under New York law.[5] *Compare Logan v. Zimmerman, Bush Co.*, 455 U.S. 422 (1982) (state statutory scheme which deprived Logan of his property without opportunity for any hearing violates due process). Fairly viewed, San Filippo alleges only that he was the object of an ad hoc conspiracy between public and private employees for some as yet undisclosed joint motive. This is precisely *Parratt*'s description of an injury where "the State cannot predict precisely when the loss will occur." 451 U.S. at 541.

The application of the *Parratt* analysis to an intentional deprivation of a liberty interest raises a substantial question under this Court's precedents on which the lower courts need guidance.

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[5] Ironically, had San Filippo not let the statute of limitations expire under New York law, he would not only not face the "conspiracy" hurdle on which his case stumbled in the Second Circuit, but he would face a more favorable witness immunity rule as well. New York law recognizes only a qualified, not absolute, immunity for discussions with the prosecutor, *Toker v. Pollack*, 44 N.Y.2d 211, 405 N.Y.S. 2d 1, 376 N.E. 2d 163 (1978), although the Court of Appeals there recognized *Vogel v. Gruaz*, 110 U.S. 311, 314 (1884), as *contra* the rule it was adopting. 44 N.Y.2d at 220, 405 N.Y.S. 2d at 5.

IV

THE COURTS BELOW ERRED IN NOT DISMISSING THE CLAIM AS TIME-BARRED AS TIME-BARRED BY NEW YORK'S ONE YEAR PERIOD FOR MALICIOUS PROSECUTION, CONTRARY TO STATE LAW AND THIS COURT'S PRECEDENTS

It is not contested that plaintiff's action is untimely under CPLR §215(3) (one year limitation for malicious prosecution). The district court (29a) was constrained to sustain the timeliness of the complaint by *Pauk v. Board of Trustees*, 654 F. 2d 856 (2d Cir. 1981), *cert. den.*, 455 U.S. 1000 (1982) ("*Pauk*"). *Pauk* rejected "any period shorter than the two years [under 28 U.S.C. §§1346(b), 2680(h)]," 654 F. 2d at 862, a holding squarely contradicted by *Johnson v. Railway Express*, 421 U.S. 454 (1975) (Title VII: one year), and *O'Sullivan v. Felix*, 233 U.S. 318 (1914) (§1983: one year).

A substantially similar issue is before this Court in *Wilson v. Garcia*, #83-2146, *cert. granted* 1 October 1984, 53 U.S.L.W. 3235.

A definitive state law ruling on this subject is soon to be forthcoming from the New York Court of Appeals. *Compare Staffen v. City of Rochester*, 80 A.D. 2d 16, 437 N.Y.S. 2d 821 (4th Dep't 1981) (§1983 claim governed by one year and ninety day period) *with Fields v. Board of Higher Education*, 94 A.D. 2d 262, 463 N.Y.S. 2d 785 (1st Dep't 1983) (3-2) (reversing the trial court) (following *Pauk*). *Fields* is now before the New York Court of Appeals on appeal from the Appellate Division, although the result seems foreordained in the defendants' favor by *Mills v. County of Monroe*, 59 N.Y. 2d 307, 464 N.Y.S. 2d 709, 451 N.E. 2d 456 (1983) (90 day notice of claim applies to §1983 action).

It would be appropriate to defer consideration of this question until either *Fields* or *Wilson v. Garcia* or both are decided.

CONCLUSION

If the petition for a writ of certiorari is granted in whole or in part, this conditional cross petition should be granted.

New York, New York
13 December 1984

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AUGUSTIN J. SAN FILIPPO, *Plaintiff,* -against- **UNITED STATES TRUST CO. OF NEW YORK INC., J. GREGORY VAN SCHAACK, BRUCE P. DENNEN,** *Defendants.*	**DECISION AND ORDER** 81 Civ. 19 (LPG)

JOEL J. TYLER
U.S. MAGISTRATE:

By order, dated June 30, 1981, Judge Lee P. Gagliardi referred this case to the undersigned for resolution of all disputes arising from discovery or other pre-trial activities. The defendants have moved by notice of motion, filed August 28, 1981, pursuant to Rule 15(a), Fed.R.Civ.P., for leave to amend their answer to assert three new affirmative defenses. The motion is granted in part and denied in part for the reasons set forth herein.

BACKGROUND

In this 42 U.S.C. § 1983 ("1984") malicious prosecution action, plaintiff alleges that defendants Gregory Van Schaack ("Van Schaack") and Bruce P. Dennen ("Dennen") conspired with Mathew Crosson ("Crosson"), an Assistant District Attorney of New York County, to maliciously prosecute him for conspiracy to steal money from defendant United States Trust Co. of New York Inc. ("U.S. Trust") (a trial having been held in which San Filippo was unanimously acquitted by the jury) (Complaint, ¶ 27). Plaintiff, in this action further alleges that exculpatory evi-

dence was withheld from and perjured testimony was presented to the Grand Jury which later indicted him and that the alleged perjured testimony was repeated at trial (Complaint, ¶¶ 21-30).

A complaint was filed in this action on January 5, 1981. The defendants filed their answer on February 27, 1981. In its Rule 15(a) motion, defendants seek to amend their answer to include the following defenses, which are set forth in the proposed Amended Answer attached to the moving papers:

1. witness immunity (that the witnesses who testified at the prior criminal proceedings are immune from civil suit based on their testimony at those criminal proceedings);
2. that the communications with the prosecutor, in connection with the prior criminal proceedings, are absolutely privileged;
3. that the plaintiff was in fact guilty of the crime of which he was charged in the prior criminal proceedings.

Defendants may amend their Answer to include affirmative defenses 1 and 3, but not 2.

DISCUSSION

Twenty days has passed since the original Answer was filed and no consent by plaintiff has been obtained; accordingly, defendant can only amend his Answer by leave of the court (Rule 15(a) Fed.R.Civ.P.).

The Supreme Court has spoken on the parameters of a court's discretion when faced with a Rule 15(a) motion:

> [T]he grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

(*Forman v. Davis*, 371 U.S. 178, 182 (1962)).

The reasons offered by New York federal courts, in denying such leave, are as follows: undue delay in requesting amendment, dilatory motive, substantial prejudice to a party in the action who is not seeking the amendment, and whether the proposed amendment is frivolous or lacks merit. *Strauss v. Douglas Aircraft Co.*, 404 F.2d 1152 (2d Cir. 1968); *Middle Atlantic Utilities Co. v. S.M.W. Development Corp.*, 392 F.2d 380 (2d Cir. 1968); *Slavin v. Benson*, 493 F.Supp. 32 (S.D.N.Y. 1980); *Glazer Steel Corporation v. Yawata Iron & Steel Co.*, 56 F.R.D. 75 (S.D.N.Y. 1972); *Holiday Publishing Company v. Cregg*, 330 F.Supp. 1326 (S.D.N.Y. 1971). These factors are considered against the backdrop of the liberal attitude applied by courts in determining Rule 15(a) motions as espoused in *Foman v. Davis, supra. Holiday Publishing Company v. Gregg, supra*, at 1328.

Plaintiff claims that the amendments are frivolous, dilatory, prejudicial to him if granted, and also that since no reason was given for the delay in proposing the amendments, they should not be permitted. *See* Affirmation of Bradford Cooke, Esq., in Opposition, sworn September 11, 1981 ("Cooke Affirmation"); Plaintiff's Memorandum of Law, dated September 11, 1981 ("Plaintiff's Memo").

I. ***Undue Delay in Bringing Motion***

Defendants bring this motion six months after the original answer was filed. Plaintiff argues that defendants failed to articulate any reason for their failure to include the three proposed defenses in their answer (Plaintiff's Memo at 4), *citing Frank Adam Electric Co. v. Westinghouse Elec. Mfg. Co.*, 146 F.2d 165, 167 (8th Cir. 1945) which holds:

> Considering the failure of the defendant to show that its long delay in tendering its counterclaim and its second amendment was due to oversight, inadvertance, or excusable neglect, we can not say that the court abused its discretion in refusing amendments.

However, here defendants have admitted that their failure to include the amendments as part of their original answer was

"probably an oversight" (Transcript of Conference held before the undersigned on September 11, 1981, at 2) ("Conference Transcript"). That the idea to include the defenses as amendments even as an afterthought does not require their denial, *Middle Atlantic Utilities Co. v. S.M.W. Development Corp., supra,* at 385; thus plaintiff's additional argument that no new facts have arisen (since the original answer was filed) to support the amendments (Plaintiff's Memo at 3) does not require a different conclusion.

Although a six month delay is not an insignificant period of time "delay alone is not usually sufficient to deny the requested relief." *Public Admin. of New York County v. Curtiss-Wright Corp.*, 224 F.Supp. 236, 238 (S.D.N.Y. 1963). Sometimes the delay argument succeeds when the proposed amendment is suggested in bad faith by the moving party who has delayed raising the amendment by 'waiting to see how he would fare' on prior pleadings. *Middle Atlantic Utilities Co. v. S.M.W. Development Corp., supra,* at 385. In this case, there is no evidence of bad faith. That this is defendants' initial request for an amendment also is a factor to be considered. *Aamco Automatic Transmissions, Inc. v. Tayloe,* 368 F.Supp. 1283, 1286 (E.D. Pa. 1973).

II. *Dilatory Motive*

Although plaintiff notes that the undersigned will set the discovery cut-off date at approximately the same time this motion is decided (Plaintiff's Memo at 2), this does not convince us that defendants seek the amendments to expand the discovery period and delay this matter. The amendments raise legal, not factual issues, and thus we do not perceive that the scope or length of discovery will be changed due to the amendments. Defendants' motive for bringing this motion was as a precautionary measure, not as a delay tactic:

> rather than get into the argument that I should have given them notice of such an issue in the case, I pleaded them.

(Conference Tr. at 3-4). However, even were it true that the scope of discovery would be broadened because of the proposed amendments, "standing alone, this does not warrant denial of the motion," *Glazer Steel Corporation v. Yawata Iron & Steel Co., supra,* at 79.

III. *Substantial Prejudice*

This case is not presently on the trial calendar and discovery is ongoing and thus we do not find any prejudice to plaintiff. *Glazer Steel Corporation v. Yawata Iron & Steel Co., supra,* at 79. Plaintiff argues that the amendments are prejudicial because "they seek to expand and confuse the issues at trial" (Cooke Affirmation at 4). However, if not frivolous, the amendments are indeed relevant to the action and do not confuse the issues at trial. It is the objective of the federal rules to allow amendments to enable courts to make proper decisions on the merits:

> The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

Conley v. Gibson, 355 U.S. 41, 48 (1957).

Plaintiff cites *Strauss v. Douglas Aircraft Co.,* 404 F.2d 1152, *supra,* for the proposition that plaintiff in this case is substantially prejudiced by defendants' delay in seeking the amendment and that failure to do so was a waiver of these defenses (Plaintiff's Memo at 2-3). However, in that case, the defendant sought to amend his answer by raising a statute of limitations defense "long [four years] after the answer was first filed." *Id.* at 1155. The court noted that if the statute of limitations had been promptly raised, plaintiff "could have undertaken various protective measures to avoid being frozen out completely, such as discontinuing this action, and renewing it in another appropriate jurisdiction where it would not be time barred." *Id.* That defendant in *Strauss v. Douglas Aircraft Co., supra,* was "obliged to plead the Statute of Limitations at the earliest possible moment", *id.,* has no bearing on the present motion.

IV. *Whether Amendments Lack Merit*

A Rule 15(a) motion may be denied when the defense sought to be added is legally insufficient or lacks merit. *Slavin v. Benson*, 493 F.Supp. 32, 33, *supra; See also, Johnson v. Partrederiet Brovigtank*, 202 F.Supp. 859, 867 (S.D.N.Y. 1962). However, when determining whether to grant such a motion, "the court is not required to determine the sufficiency of the proposed amendment, when it is not patently deficient." *Reines Distributors, Inc. v. Admiral Corporation*, 39 F.R.D. 39, 41 (S.D.N.Y. 1963). Thus "[i]n practice, courts have freely granted leave to amend unless the proposed change is clearly frivolous or advances a claim or defense that is clearly meritless." *Slavin v. Benson, supra*, at 33. Therefore, it is not our objective to determine now, at the pleading stage, whether the proposed affirmative defenses will ultimately prevail but to allow possibly meritorious defenses to be pleaded so that a proper determination on the merits can later be made. *See Conley v. Gibson, supra*, at 48.

Of the three affirmative defenses sought to be amended to the answer, one—that communications with the prosecutor are absolutely privileged—is meritless and will not be allowed. It cannot be said that the other two are devoid of merit and thus they will be allowed.

We note at the outset that plaintiff who opposes the motion does not anywhere assail the authorities cited by defendants to support the merits of the proposed affirmative defenses.

1. *Witness Immunity*

The first amendment sought to be added asserts that witnesses at the prior criminal proceedings (defendants herein) are immune from suit and civil damages based on their prior testimony. In *Burke v. Miller*, 580 F.2d 108 (4th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979), cited by defendants, Burke, after being convicted of murder in Virginia, sued Miller, the State Medical Examiner, charging him with violating his civil rights pursuant to 42 U.S.C. § 1983, by falsely testifying at the trial.

The court indicated that under the "common law", an "inviolable immunity is accorded witnesses" and extended the rule to provide for absolute immunity under 1983. *Id.* at 109. Thus, although the factual situation is different in the present case, it cannot be said that this defense is devoid of merit. *See also Blevins v. Ford*, 572 F.2d 1336, 1338-39 (9th Cir. 1978), for support of this proposition.

2. *Privileged Communications with Prosecutor*

In their second proposed amendment, defendants assert that defendants' communications with prosecutor Crosson are absolutely privileged, citing only *Vogel v. Gruaz*, 110 U.S. 311, 314 (1884) for support (Defendants' Memorandum of Law at 2-3 and their Reply Memo at 2). Subsequent to that case, the Supreme Court reviewed the informer's privilege, articulated in *Vogel*, in *Roviaro v. United States*, 353 U.S. 53 (1957). In *Roviaro*, the court held that information communicated to the government is only qualifiedly privileged:

> What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. *Scher v. United*, 305 U.S. 251, 254; *In re Quarles and Butler*, 158 U.S. 532; *Vogel v. Gruaz*, 110 U.S. 311, 316, ... The scope of the privilege is limited by the underlying purpose. Thus, where the disclosure of the contents of the communication will not tend to reveal the identity of an informer, the contents are not privileged. Likewise, once the identity of the informer has been disclosed to those who have cause to resent the communication, the privilege is no longer applicable.

Id. at 59-60.

Thus since the identity of the informers in the prior criminal proceedings is known to plaintiff herein, the privilege does not apply and the amendment is meritless and is not allowed.

That *Roviaro* controls and not *Gruaz* is supported by *Henrik Mannerfrid, Inc. v. Teegarden*, 23 F.R.D. 173, 176 (S.D.N.Y. 1959), which interpreted, *Roviaro, supra:*

> To the extent that they state a broad or unlimited scope for the privilege, the older cases on which plaintiff relies are not in accord with the principles set forth in Roviaro, and they must be considered no longer controlling. Thus, when the Supreme Court cited In re Quarles and Vogel v. Gruaz in the portion of the opinion [*Roviaro v. United States, supra*] quoted above, it was only for the proposition that the informer's privilege is in fact the Government's privilege to refuse to reveal the identity of informers. The suggestion in these nineteenth century cases that the communication may be absolutely privileged was implicitly rejected by the Supreme Court.

See also United States v. Bell, 506 F.2d 207, 216 n.50 (D.C. Cir. 1974) ("Decisions prior to *Roviaro* had considered the informant privilege absolute in character. *E.g., Vogel v. Gruaz*, 110 U.S. 311, 315-316. . . . We have long since realized that *Roviaro* abandoned that concept . . ."); *Toker v. Pollack*, 44 N.Y.2d 211, 221 (1978) (holding that communications to a district attorney were not absolutely privileged, but only qualifiedly privileged, in a subsequent libel and slander suit).

3. *Guilt of Malicious Prosecution Plaintiff in Prior Proceeding*

The final defense defendants seek to assert alleges that plaintiff should lose this malicious prosecution action because, although, plaintiff herein was found not guilty of the prior charges, he was in fact guilty. Although, plaintiff argues that granting this defense would be "[a]llowing a retrial of the criminal charges" and that such retrial "violates plaintiff's constitutional protection against double jeopardy" and further that "defendants are collaterally estoppel [sic] from raising those issues that were resolved previously," (Cooke Affirmation at 4), plaintiff cites no authority to support these contentions. The sixth Circuit has noted that "a plaintiff in a suit for malicious prosecution does place in issue the question of his guilt or innocence even though he was acquitted by the jury in a criminal prosecution." *Sessoms v.*

Union Savings & Trust Company, 338 F.2d 752, 757 (6th Cir. 1964), *cert. denied*, 382 U.S. 821 (1965). The rational supplied by the court for this rule rests upon the "differences in the degree of evidence required to prove guilt in the criminal case and in the civil case." *Id.* Professor William L. Prosser has also indicated that in a malicious prosecution action "it is always open to the defendant to show that the plaintiff was in fact guilty of the offense with which he was charged." (Prosser, Law of Torts, 4th Ed. 1971 § 119 at 840). Thus, this proposed amendment is not patently meritless.

Based on the reasons espoused herein, defendants' motion to amend his answer is granted in part and denied in part as herein indicated. The Amended Answer, as corrected in accordance herewith, shall be served within five (5) days of the date of the Decision and Order.

DATED: New York, New York
October 30, 1981

SO ORDERED.

JOEL J. TYLER
UNITED STATES MAGISTRATE

Copies of the foregoing Decision and Order have been mailed this date to:

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